FILED
JAN 11 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 530

ARTIGAS BATTLE ROBERTO MACHADO,
Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE STATES, ET AL.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION AND BRIEF IN SUPPORT

JACK WASSERMAN,
Warner Bldg.,
Washington, D. C.,
Attorney for Petitioner.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes	2
Regulations	4
Statement	6
Reasons for Granting Certiorari	7
Argument:	
I. The Circuit Court Erred in Finding that Petitioner was a Resident Subject to the Selective Training and Service Act and its Regulations	11
II. The Circuit Court Erred in Finding that the Termination of Neutrality by Uruguay and Submission to Induction By Petitioner Did Not Remove the Bar of of Ineligibility to Citizenship	18
III. The Circuit Court Erred in Finding That the Citizenship Disability Is Still Operative	24
Conclusion	30

Citations

Cases:

Benzian v. *Godwin*, 168 F. (2d) 952	9
Cook v. *United States*, 288 U.S. 102, 122	28
Duke Power Co. v. *S.C. Tax Comm.*, 81 F. (2d) 513	26
Ewell v. *Daggs*, 108 U.S. 143	26
Ex Parte Ghosh, 58 F. Suppl. 851, 148 F. (2d) 822	14
In re Bevelacqua, 295 Fed. 862	20
In re Carlson, 730-P 259687	25
In re Gustavson, 300 Fed. 251	11, 19
In re Martinez, 73 F. Supp. 101, 105	28
In re Siem, 284 Fed. 868, 299 Fed. 582	19
In re Urmenta, 42 F. Supp. 138	25
In re Wieg, 30 F. (2d) 416	17

	Page
Koshland v. *Helvering*, 298 U.S. 441, 447	8, 17
Kristensen v. *McGrath*, 179 Fed. (2d) 796, 340 U.S. 162	7, 8
Life Insurance Co. of Tenn. v. *McCray*, 291 U.S. 566, 574	28
Matter of Ali Ipar, VP File No. 391915, Dept. of Justice, July, 1948	18
Matter of Bannout, Immigration File 3087364	8, 31
Matter of Josefsson, Immigration File 4558054	11
McCulloch v. *Murphy*, 125 Fed. 147	28
Milne v. *Deen*, 121 U.S. 525	7
Morrissey v. *Commissioner*, 296 U.S. 344, 356	8, 17
Moser v. *U.S.*, 341 U.S. 41	11
National Labor Relations Board v. *Nat. Garment Co.*, 166 F. (2d) 233, 237 and Footnote 4	28
Perkins v. *Elg*, 307 U.S. 325	22
Petition of Ajlouny, 77 F. Supp. 327	23
Petition of Otness, 49 F. Supp. 220	25
Skinner & Eddy Corp. v. *United States*, 249 U.S. 557	9, 11
The Irresistible, 7 Wheat. 551	25
U.S. v. *Boisdore*, 8 How. 113	25
U.S. ex rel. De Lucia v. *O'Donovan*, 178 F. (2d) 876	9, 11
U.S. v. *Ginsberg*, 243 U.S. 472	28
U.S. v. *Hark*, 320 U.S. 531	26
U.S. v. *Reisinger*, 128 U.S. 398	26

Statutes:

Immigration Act of 1917 (8 U.S.C. 155(c)(2)	4
Public Law 201 (61 Stat. 633)	27
Selective Training and Service Act of 1940 (54 Stat. 884, 55 Stat. 844)	2
Selective Training and Service Act of 1948 (62 Stat. 604, 50 U.S.C. 454)	9

Miscellaneous:

23 American Jurisprudence 598, 599, 622	28
87 Cong. Rec. 9905, 10055	17
59 Corpus Juris 1189, 1190	25

Page
37 Corpus Juris Secundum 45 28
III Hackworth, Digest of International Law 600 10
House Report 261, 78th Cong., 1st Session 27
House Report 1554, 77th Cong. 1st Sess. 17
IV Moore, International Law Digest 57 10
39 Op. Atty. Gen. 504 10
Senate Report 915, 77th Cong., 1st Sess. 17
Senate Report 734, 78th Cong., 2nd Sess. 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

ARTIGAS BATTLE ROBERTO MACHADO,
Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE STATES, ET AL.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION AND BRIEF IN SUPPORT

The Petitioner, by his attorney, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 6) which reversed an order of the District Court (R. 4) dismissing petitioner's complaint.

Opinions Below

The Court of Appeals opinion is unreported and is set forth at page 7 of the record herein. The District Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Petitioner, a citizen of Uruguay, was issued a business visitor's visa in 1944 by the State Department for the purpose of entering the United States for a temporary period of one year. On March 14, 1944, he was admitted to the United States by the Department of Justice as a business visitor for one year.

1. Could the petitioner properly be classified in 1944, by a third agency of the Government, the Selective Service System, as a person residing in the United States, subject to the Selective Training and Service Act of 1940 (50 App. U.S.C. 303a), although the two agencies primarily concerned with his immigration status, the Department of State and the Department of Justice, considered him a mere visitor or sojourner, and did a claim for exemption as a neutral alien, filed by petitioner on July 14, 1944, four months after his entry, bar him from citizenship and from the benefits of suspension of deportation pursuant to 8 U.S.C. 155c?

2. Is petitioner relieved from the bar of citizenship because of the subsequent belligerency of Uruguay in 1945 and his own subsequent submission to induction in 1945 during the Battle of the Bulge?

3. Is the bar of citizenship under 50 App. U.S.C. 303a still operative or did it terminate with the expiration of the Selective Service Act of 1940?

Statutes

Section 303(a) of Title 50, Appendix, United States Code, pertaining to exemption of neutral aliens from military service, reads in part as follows:

"Persons liable for training and service; number; term; status after completion of term; pay; allowances; and benefits; place of employment

(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . ."

Section 305(a) of Title 50, Appendix, United States Code, provides in part:

"* * * persons in other categories to be specified by the President, *residing* in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required to be registered under section 2 and shall be relieved from liability for training and service under section 3(b)."

Section 316(a) and (b) of Title 50, Appendix, United States Code, relating to the suspension of laws conflicting with the Selective Training and Service Act of 1940, reads as follows:

"Suspension of conflicting laws; expiration of Act; appropriations.

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) The provisions of the third sentence of section 3(a) of this Act (section 303(a) of this Appendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act (sections 301-303, 304, 305, 306-309, 310, and 311-318 of this Appendix), except the provisions of section 3(b), 3(c), 3(d), 8, and 16(b) (sections 303(b), 303(c), 303(d), 308, and 316(b) of this Appendix), and the fourth and fifth provisos of the second sentence of section 3(a) (Section 303(a) of this Appendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date." . . .

8 U. S. C. 155(c)(2) provides in part that:

"In the case of any alien (other than one to whom subsection (d) [1] is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien if not racially inadmissible or ineligible to naturalization * * *"

Regulations

The following regulations were effective February 7, 1942, 7 Fed. Reg. 855:

32 C. F. R. 611.12. When a nondeclarant alien is residing in the United States. Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of #611.13, is a 'male person residing in the United States' within

[1] Subsection (d) refers to aliens deportable on criminal, subversive or moral grounds.

the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

32 C. F. R. 611.13. When a nondeclarant alien is not residing in the United States. (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

* * * * * * *

(6) If he has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later.

(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942 or for more than 3 months following the date of his entry, whichever is the later, he is a 'male person residing in the United States' within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in #611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as a 'male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence

(Form 303) issued to him as a result of the determination that he is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended. (54 Stat. 885; 50 U. S. C., Supp. 301-318, inclusive; E. O. No. 8545, 5 F. R. 3779).

32 C. F. R. 611.21. What aliens may apply for a determination. Any nondeclarant alien who has entered or who hereafter enters the United States * * * may file with his local draft board * * * an Alien's Application for Determination of Residence (Form 302); *Provided,* That such application is filed within three months after the date of his entry into the United States or within three months after persons of his age become liable for training and service by law, whichever is the later; *And provided further,* That such application is filed prior to induction * * *.

Statement

The complaint alleges that petitioner, a citizen of Uruguay, was admitted to the United States as a business visitor for one year on March 14, 1944 (Complaint, par. 4, R. 1). Approximately four months after his arrival, and when he was still here legally as a business visitor, petitioner executed an exemption claim as a neutral alien under the Selective Training and Service Act of 1940 (Par. 8). Petitioner alleges that at the time, he could not read or write English, that he was under the impression he was applying for a certificate of nonresidence (Par. 9-12). Uruguay subsequently declared war in 1945 and appellant sought to withdraw his exemption claim, was given a physical examination and rejected (Par. 14-18). Petitioner has been held to be ineligible for citizenship and he attacks such ruling. He claims that he was not residing in the United States in 1944, that his exemption claim was void because he was a nonresident, because of mistake, because he later volunteered for army service, because Uruguay later gave

up its neutrality and because the disabling provisions of the Selective Service Act of 1940 are no longer operative.

The complaint alleges that petitioner is married to an American citizen and by reason of his actions as aforesaid it has been held that he is ineligible to citizenship and therefore as a matter of law he cannot adjust his immigration status to that of a permanent resident under 8 U. S. C. 155 (c) (2). An official order has been entered by the Department of Justice directing that he leave the United States within sixty days (Par. 13, 22-26). Petitioner seeks a declaration that he is eligible for American citizenship and therefore not barred as a matter of law from adjusting his immigration status to that of a permanent resident.

The District Court dismissed petitioner's complaint for failure to state a cause of action (R. 4). The Circuit Court of Appeals rejected all contentions of petitioner but that of mistake and entered an order reversing and remanding solely upon the ground that a cause of action was stated on the issue of mistake (R. 7-11). As noted by this Court and the Government's Brief, page 64, in *Kristensen* v. *McGrath*, 340 U. S. 162, the issue of mistake and the other issues presented, become relevant only after it is first determined that petitioner is a resident under the Selective Training and Service Act of 1940. The Court below found that the petitioner was a resident and because of the importance of this primary issue, and the fact that it becomes the law of the case, unless certiorari is granted (*Milne* v. *Deen*, 121 U. S. 525), this petition is now presented.

Reasons for Granting Certiorari

1. Whether a temporary visitor who was here only four months in 1944, is a resident for Selective Service purposes and whether Congress authorized the induction of such mere sojourners, is an issue which is of great importance in the

administration of our immigration and nationality laws. As will be noted by the decision of the Board of Immigration Appeals in *Matter of Bannout*, annexed hereto as Appendix A, the application of the *Kristensen* decision to such facts, has produced a divergence of opinion between the Commissioner of Immigration and the Board of Immigration Appeals. The issue was considered of such general importance that it was certified to the Attorney General pursuant to 8 C. F. R. 90.12c—a procedure invoked sparingly, and reserved for questions of general application.

2. The decision below is in conflict with *Kristensen* v. *McGrath*, 340 U. S. 162. Kristensen was here two and one-half years when he claimed exemption as a neutral alien. Petitioner was here only four months. Kristensen was here illegally. Petitioner was here legally as a visitor at the time he filed the form as a neutral alien. If Petitioner was not residing here for Selective Service purposes, he was not subject to the statute and regulations could not alter his status. The only theory upon which petitioner could be considered a resident is the opinion of the Attorney General in *39 Op. Atty. Gen. 504*, which was repudiated by this Court in the *Kristensen* case.

3. The decision below is in conflict with other decisions of this Court, *Koshland* v. *Helvering*, 298 U. S. 441, 447; *Morrissey* v. *Commissioner*, 296 U. S. 344, 356 and *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, which hold that regulations cannot alter or amend a statute, especially where the regulations themselves require explication. The Court of Appeals held that petitioner was a person residing in the United States under the Selective Training and Service Act because he had not applied within three months after his arrival for a certificate of nonresidence which would have been "judged by the applicable administrative and judicial standards".

In the first place, the regulations were issued pursuant to 50 App. U. S. C. 305a which authorized the President to specify categories of persons *residing in the United States* who would be exempt from military service. But since petitioner was not a resident, the regulations were irrelevant because he was outside their reach. Secondly, the total failure of the regulations to provide norms or standards for ascertainment of residence has resulted in their condemnation as arbitrary and capricious and violative of due process. *Ex parte Ghosh*, 58 F. Supp. 851, 853-855, appeal dismissed 148 F. 2d 822. Petitioner was not obliged to submit to administraitve remedies under regulations which were invalid because of vagueness or because they exceeded statutory authority. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; *U. S. ex rel. De Lucia* v. *O'Donovan*, 178 F. 2d 876. Thirdly, it should be noted that on June 27, 1945, the regulations were amended permitting application for a determination to be filed after three months. (Regulation 611.21-1; *Benzian* v. *Godwin*, 168 F. 2d 952, Note 9.) But at that time, petitioner had already submitted himself to induction, and the amended regulations furnished him no relief. Should he be penalized because he desired to serve in 1945, and should he be in a worse position than one who continued to avoid service by applying for non-residence under the amended regulations?

4. The issue here presented is important in the administration of the Selective Training and Service Laws. It is not confined to the Selective Training and Service Act of 1940 as the Selective Service and Training Act of 1948 (62 Stat. 604, 50 Appendix U. S. C. 454) is likewise restricted to "every male citizen of the United States and every other male person residing in the United States." The statute provides for exemption claims by neutrals as well as non-neutrals, with an accompanying citizenship bar, 50 App.

U. S. C. 454(a). And the regulations seek to subject to registration those here six months (32 CFR 611a) and to service, aliens, including temporary visitors, who remain longer than twelve months (32 CFR 622.18, E. O. 9992, 13 F. R. 6101). A clarification of the statutory language in the instant case is therefore necessary as a guide to the Selective Service authorities in the interpretation of the 1940 as well as the 1948 Act so that they may know whether temporary visitors are within the terms of the statute and whether they may promulgate regulations covering such individuals.

5. The issue presented here is important in our foreign relations with other nations. In international law it is thoroughly established that a temporary visitor or sojourner is not subject to military service in the country of his visit or sojourn. IV *Moore, International Law Digest* 57; III *Hackworth, Digest of International Law,* 600. We have frequently protested against the induction of American citizens temporarily and lawfully sojourning abroad. III *Hackworth, supra,* 362. The language of the Selective Service Act should be interpreted consistently with our international contentions. Justice Jackson, *Kristensen* v. *McGrath, supra.*

6. A ruling upon the issue here presented is important to the administration of justice. An erroneous ruling by the Department of Justice, *39 Op. Atty. Gen. 504,* resulted in Selective Service Regulations, which improperly sought to subject the petitioner, a mere sojourner in the United States, to military duty. As a matter of fair play, petitioner, and the many visitors similarly situated, should have their status corrected, especially since it means the difference between banishment from the United States and their families and continued residence here.

7. A secondary issue raised herein, is whether the subsequent belligerency of Uruguay and submission to induc-

tion by petitioner during the Battle of the Bulge, removed the citizenship bar. The Board of Immigration Appeals and the Criminal Division of the Department of Justice, relying on *In Re Gustavson*, 300 Fed. 251, believed that it does. (*Matter of Josefsson*, Immigration File 4-558054). The Selective Service system, likewise followed the same view (Local Board Memo. No. 112, as amended December 20, 1943, Part V, p. 3; and see *Matter of Josefsson, supra*). However, on June 9, 1947, in the *Josefsson* case, the Attorney General declined to follow this view and ruled that once a claim for exemption as a neutral had been made, the privilege of American citizenship is irretrievably lost. The injustice of such a harsh ruling and the divergent views expressed upon this subject are such as merit clarification by this Court.

8. Finally, it is submitted, that it is desirable to settle the problem raised herein and expressly left open by *Kristensen* v. *McGrath* 340 U. S. 162 and *Moser* v. *United States*, 341 U. S. 41; *i.e.*, whether the bar of ineligibility survives the expiration of the Selective Training and Service Act of 1940.

I

The Circuit Court Erred in Finding That Petitioner Was a Resident, Subject to the Selective Training and Service Act and Its Regulations.

On the record herein, the issue to be determined *in limine* is whether petitioner, a lawful temporary visitor, recognized as such by the State Department and the Department of Justice, is a person *residing* in the United States for Selective Service purposes.

In *Kristensen* v. *McGrath*, 340 U. S. 162, this court said:

> "If Kristensen was not 'residing' at the time of his application for relief, he could not have had 'such liability' for service. . . . As there was no liability for

service, his act in applying for relief from a nonexistent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved.

• • •

The phrase of #3(a) 'every other male person residing in the United States,' when used as it is, in juxtaposition with 'every male citizen', falls short of saying that every person in the United States is subject to military service.

• • •

"When we consider that #3(a) was obviously intended to require military service from all who sought the advantages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders made necessary by the conditions of the times was residence within the meaning of the statute."

Justice Jackson in a separate concurring opinion declared:

"The United States consistently has asserted the right of its citizens to be free from seizure for military duty by reason of temporary and lawful presence in foreign lands. Immunities we have asserted for our own citizens we should not deny to those of other friendly nations. Nor should we construe our legislation to penalize or prejudice such aliens for asserting a right we have consistently asserted as a matter of national policy in dealing with other nations. Of course, if an alien is not a mere sojourner but acquires residence here in any permanent sense, he submits himself to our laws and assumes the obligations of a resident toward this country.

"The language of the Selective Service Act can be interpreted consistently with this history of our inter-

national contentions. I think the decision of the Court today does so."

The Circuit Court, however, distinguished the *Kristensen* case, and held that the petitioner was a resident, because he failed to apply within three months for a certificate of non-residence pursuant to 32 C. F. R. 611.21. The Court said:

> "Appellant argues, however, that regulations which, in his case, make a mere temporary visitor of four months a resident cannot be valid. We disagree. The regulations do not arbitrarily state that anyone who remains here longer than three months shall be deemed a resident regardless of the purpose, duration or circumstances of his presence. They merely require that one who comes to this country in time of war must act within three months to have his status as a resident determined. If the required application is filed, the alien will have his case judged by the applicable administrative and judicial standards. * * * But if it is not filed, then his status as a resident is in effect taken as confessed."

It is submitted that the Circuit Court's reasoning overlooked three important considerations in reaching this determination. First, it is obvious that if petitioner was not residing here, he was not subject to the statute or the regulations. Secondly, it should be observed that the regulations provided no standard whatsoever for determining which visitors, here more than three months, were residents and which were to be treated as non-residents. Finally, it must be remembered that the regulations were framed in 1942, on the basis of the decision of the Department of Justice, *39 Op. Atty. Gen. 504*, which erroneously assumed that all aliens physically present in the United States were subject to the Selective Training and Service Act of 1940. The regulations therefore attempted to expand the mean-

ing of the term "residing" beyond its statutory meanings and were accordingly invalid.

1. The regulations were irrelevant because petitioner, by statutory definition was outside their reach. The regulations were promulgated pursuant to 50 App. U. S. C. 305a which authorized the President to specify the categories of persons *residing in the United States,* who would be exempt from military service. This provision, as was 50 App. U. S. C. 303a, was limited by its terms to persons *residing in the United States,* which necessarily excluded petitioner. Hence there was no statutory authority for regulations which required any affirmative action on the part of petitioner. He was not required to submit to regulations which exceeded the statutory authority of the Selective Service System. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562; *U. S. ex rel. De Lucia* v. *O'Donovan,* 178 F. 2d 876.

2. In *Ex Parte Ghosh,* 58 F. Supp. 851, appeal dismissed, 148 F. (2d) 822 the Court held that an alien who entered the United States in 1940 on a student's visa was not a resident four years later and therefore was not subject to military training. It was there said:

> "I do think the action of the local board was arbitrary and capricious when it reversed its three previous determinations that he was not a resident of the United States. I do not think there was any evidence to support it.
>
> "I do not think the rules and regulations provide any norm or standard by which the local board can determine whether or not a person is in one of the 'other categories' mentioned in Section 5 of the Act, 50 U.S.C.A. Appendix, #305; nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not 'residing in the United States' as the term is used in Sections 2 and 3 of the Act, 50 U.S.C.A. Appendix #302, 303.
>
> "In connection with this matter the determination by

the Bureau of Naturalization and Immigration that this man retained his student status and is thus not a resident, must be given weight. He is not, under the Immigration and Naturalization Laws, entitled to citizenship, or to be a permanent resident of the United States, or a resident at all. At the most, he can only be a visitor, and that only so long as he remains a student.

• • • • •

"And after all, it is one government, and I do not think it is within the contemplation of our system that a man should be fish before one department and fowl before another. If he can be a student-visitor—and not a resident—so far as the government of the United States is concerned when it is interpreted by the Department of Immigration and Naturalization, and be a resident so as to subject him to military service on behalf of the United States insofar as some other government department is concerned, it would require I think what John Marshall called refined and metaphysical reasoning.

• • • • •

"I believe that the power existed under Section 5 of the Act for the President to establish 'categories of people' who would be non-residents. But the President delegated his power to the Director of Selective Service in that connection. The Director of Selective Service did not either in his own name or in the name of the President specify or establish any categories other than those that, in the Act are designated with particularity.

I think he has simply, under the regulations as they now stand, reserved to himself the power personally to determine—by what rules, no one would know—this petitioner or any other person who sought a certificate of exemption [as a non-resident]—whether he was or was not entitled to it.

That, in my judgment, is what is described in the decisions as arbitrary and capricious, and I would say lack of due process and a lack of rule of reason."

The foregoing view, that the regulations described the status of some persons as not residing here, leaving others to ascertain their status by executive determination was approved by the Circuit Court in the *Kristensen* case, 179 F. (2d) 796, 805, Note 13.

3. The Selective Service Regulations under the 1940 Act were founded upon the opinion of the Attorney General in 39 *Op. Atty. Gen.* 504 which erroneously held that all aliens physically present in the United States are subject to military training. The regulations as originally promulgated, effective February 7, 1942, 7 Fed. Reg. 855, provided that an alien who did not file a citizenship declaration and remained here less than three months was a non-resident. The alien who remained more than three months was required to file an application to determine his non-residence within three months of his entry if he was of military age. On June 27, 1945, the regulations were amended to permit an application for determination of residence to be filed after three months (32 C.F.R. 611.21; *Benzian* v. *Godwin, supra*). As noted in the *Ghosh* case, the regulations provided no standards for determining under what circumstances an alien here longer than three months was to be considered either a resident or non-resident. Under the Selective Training and Service Act of 1948 (62 Stat. 604, 50 Appendix U.S.C. 454) which contains the same language as the 1940 Act, the regulations provide for the registration of aliens within six months of entry and they are automatically deferred where they are legal temporary visitors for one year and have not declared their intention to be citizens. (E.O. 9992, 32 C.F.R. 622.18).

Kristensen was in the United States two and a half years when he claimed draft exemption. *Ghosh* was here four years when he was inducted. *Kristensen* was here illegally at the time of his draft exemption claim. Yet *Kristensen*

and *Ghosh* were held to be non-residents. Petitioner was here temporarily and legally for only four months when he claimed exemption. Petitioner should not be in a worse position than *Kristensen*, because unlike the latter, he did not seek work during his temporary stay and become subject to deportation. His position should be stronger. He abided by the terms of his temporary admission. For immigration purposes he was a non-resident. For naturalization purposes, he was not a resident. *In re Wieg*, 30 F. (2d) 416. For income tax purposes he was a non-resident. 29.211-2 Income Tax Regulations. In the absence of a clear Congressional intent to the contrary, and there was none (Senate Report 915, House Report 1554, 77th Congress 1st Sess., 87 Cong. Rec. 9905, 10055), it must be assumed that the Selective Training and Service Act of 1940 used the term "residing" in its normal legal and lay sense. Thus, petitioner, a legal temporary visitor, was not an alien resident subject to military service under the statute.

> "Where . . . the provisions of the act are unambiguous, and its directions are specific, there is no power to amend it by regulations." *Koshland* v. *Helvering*, 298 U. S. 441, 447.
>
> "The question . . . is simply one of statutory construction . . . The difficulty with the regulations as an exposition was that they themselves required explication; that they left many questions open with respect both to the application to particular enterprises and to their validity as applied." *Morrissey* v. *Commissioner*, 296 U. S. 344, 356.
>
> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the Statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a

mere nullity." *Manhattan Co.* v. *Commissioner*, 297 U. S. 129.

The Regulations of Selective Service under the 1940 Act come within the condemnation of the foregoing quotations of the Supreme Court. The regulations could not alter the meaning of the word "residing" under the statute and an administrative ruling that petitioner was a resident would not be legally sustainable. In any event no regulation provided any standard for determining the residence or non-residence of a person in petitioner's position. *Ex parte Ghosh, supra.* Unlike *Kristensen,* where there might be some doubt since *Kristensen* was no longer a lawful temporary visitor when he claimed exemption, here the petitioner was clearly a legal temporary visitor—a non-resident. Hence, regulations could neither clarify nor alter his status.

II

The Circuit Court Erred in Finding That the Termination of Neutrality by Uruguay and Submission to Induction by Petitioner Did Not Remove the Bar of Ineligibility to Citizenship.

On February 22, 1945 Uruguay declared war against Germany and thereafter petitioner was no longer a neutral alien and he submitted himself to induction.

The view might be expressed that the mere claim of exemption as a neutral perpetually bars an alien from citizenship. This is not so. Subsequent service in our Armed Forces during World War II (under the Selective Service Act of 1940 which expired March 30, 1947) was held by Attorney General Clark to render an alien eligible for citizenship. *Matter of Ali Ipar* (V.P. File No. 391915, Dept. of Justice, July 1948).

Other cases support the conclusion that the mere filing of

a draft exemption claim as a neutral (DSS Form 301), does not irretrievably create a permanent bar. *In re Gustavson,* 300 Fed. 251 (S. D. Cal. 1924) arose after the first World War. The alien claimed exemption from the draft but thereafter served honorably in our Armed Forces. The court's opinion does not show whether the subject was inducted or whether he volunteered. His petition for naturalization was denied because of lack of attachment to the principles of the Constitution. The court however stated with reference to the claim of exemption that:

> "The intention of that Act (the Act of May 18, 1917, as amended on July 9, 1918) plainly was to fix a penalty where an alien declarant was relieved from military service; that is, if he withdrew his declaration of intention, so as to make effectual his claim for exemption from service, he should therefore 'forever be debarred' from becoming a citizen of the United States. 'In this case the government did not relieve the declarant from service, and he actually did serve and receive an honorable discharge; hence no exemption right was accorded him, and he should not be held to have incurred the penalty fixed. The denial of his application should therefore only be because of his claim for exemption under the draft, and the record should not show that he incurred the penalty provided for under the Act of July 9, 1918 . . ."

In re Siem, 284 Fed. 868 (D. Mont. 1922) aff'd *United States* v. *Siem,* 299 Fed. 582 (C. C. A. 9, 1924) also involved a World War I case. Here a Norwegian claimed exemption because of (1) alienage; (2) dependents; and (3) physical condition. He was classified 1A, called for induction and rejected as physically unfit. In holding that his claim for exemption was not a bar to naturalization, the court said:

> "the government denied petitioner's claim of exemption, called him, in good faith he responded, and then it rejected him, because physically unfit. In these

> circumstances, to allow it to go back of that examination and resort to the denied claim to bar his admission, would be to sanction bad faith, and is not tolerable."

See also: *In re Bevelacqua,* 295 Fed. 862 (D. C. Mass., 1924) where Judge Lowell recognized that "some locus poenitential should be allowed" aliens who claimed exemption from the draft.

It would seem that upon the reasoning of the above cases, that petitioner is now eligible for naturalization. This view has been taken by the Director of the Selective Service System who stated in a letter of November 22, 1946 (contained in Immigration File of *Matter of Josefsson,* 4-558054):

> "where the benefits derived by a neutral alien by the proper filing of DSS Form 301 no longer exist (exemption from training and service), it is our inclination that the penalties incurred by such action (debarment from obtaining United States citizenship) should likewise be removed. This opinion contemplates the situation where a neutral alien, who has filed a DSS Form 301, is later declared a cobelligerent alien, and thus subjected to training and service under the Selective Training and Service Act."

Until June of 1947 the above quoted language also represented the view of the Department of Justice. On March 18, 1947 the Board of Immigration Appeals decided the case of *Matter of Josefsson,* File No. 4-559054, a native of Finland who was rejected on physical grounds. He had claimed exemption and was called for induction after Finland became a cobelligerent on April 5, 1945. The Board said:

> "We think that the principle of the *Gustavson* case applies here. Respondent, as of April 5, 1945, was no longer legally entitled to claim exemption from military service. Like all citizens and all aliens, other than those of neutral countries, he became subject to military

> service. The benefits of Section 3(a) of the Selective Training and Service Act of 1940, as amended, could no longer be claimed by him. That being the case, we see no reason why he should be subjected to the penalties of that provision. The Director of the Selective Service System is in accord with our position."

The *Josefsson* case was certified to the Attorney General who sought the advice of the Criminal Division and the Assistant Solicitor General. On April 9, 1947, the Assistant Attorney General in charge of the Criminal Division advised that the *Siem* and *Gustavson* cases were applicable and recommended that the Board's view be adopted. He stated:

> I am inclined to the view of the Board of Immigration Appeals that the alien in this case lost all benefits of his claimed exemption from military service as a neutral alien when Finland became a cobelligerent in the war. He was, as of the date of Finland's cobelligerency, amenable to all provisions of the Selective Service and Training Act of 1940, and could not under those provisions make a further claim of exemption. He thereafter reported to the Armed Forces for induction at the direction of his local Selective Service Board. Because he was subsequently rejected for physical reasons it is no fault of his and should not be held against him. When the exemption accorded to the alien disappeared it is my belief that the penalty of never being permitted to become a United States citizen dropped also. I believe that the alien in this case is not an alien ineligible to citizenship."

The Assistant Solicitor General recommended reversal on the incorrect assumption that even where an alien subsequently served in the Armed Forces he was ineligible to citizenship (see *Matter of Ali Ipar, supra,* where the Attorney General held to the contrary). He further incorrectly assumed that *Josefsson* could not litigate the *issue of law* thus raised, because he was applying for discretionary

relief. (*Perkins* v. *Elg*, 307 U. S. 325, and the *Kristensen* case are to the contrary.)

His memorandum stated:

> "I recommend your approval of the annexed draft of an opinion reversing the Board of Immigration Appeals in the above mentioned case.
>
> "It has been suggested that the courts may be loath to impose the 'penalty' (ineligibility for citizenship), particularly upon persons who claimed exemption but thereafter actually served in our Armed Forces. It is probable that the courts will ultimately decide the question; and no alien who is legally within the country will be inconvenienced by the opinion or have any difficulty in invoking the aid of the courts if he wishes to assume our citizenship.
>
> "The alien involved in this case entered the country illegally and is, for that reason, subject to deportation. If the courts should hereafter decide the question in such manner as to require the conclusion that he is eligible for citizenship he could then, with permission of the Attorney General, apply for readmission. It does not appear practicable, however, for him to initiate any effective litigation in his own behalf since the relief which he seeks (voluntary deportation and pre-examination) lies within the discretion of the Attorney General."

Upon this advice, the Attorney General signed an opinion dated June 9, 1947 and reading in part as follows:

> "It has been urged in behalf of Mr. Josefsson (and others similarly affected) that he is not barred because his claim for exemption did not receive complete and uninterrupted recognition due to the fact that he was called for military service after Finland became a co-belligerent. *In re Gustavson*, 300 Fed. 251 (S. D. Cal. 1924); and *In re Siem*, 284 Fed. 868 (Montana 1922); affirmed 299 Fed. 582 (C. C. A. 9, 1924), are cited. Both cases arose under the Selective Draft Act of 1917 which

contained a provision comparable to that under consideration. In each case the alien's claim for exemption failed to be accorded recognition. Gustavson actually served in the Army; Siem was called for induction but rejected as physically unfit. It will be observed that these cases are readily distinguishable, in the first place, for the reason that the claim for exemption received no recognition at all.

"Until and unless the question of eligibility for citizenship be otherwise decided by the courts, I feel that I must give effect to the language of the statute and to the intent which I think moved the Congress in enacting the law."

In *Petition of Ajlouny*, 77 F. Supp. 327 (E. D. Mich., April 23, 1948) a native of Palestine claimed exemption as a neutral alien because he had a family in Europe to support and army allotments were not then being sent abroad. On February 9, 1943 he asked permission to cancel this exemption claim. He submitted to induction and was found physically unfit. The court (Judge Levin) posed the question as follows:

"Under these circumstances, do the statutes of the United States inexorably command that the court deny citizenship to the petitioner?"

In granting citizenship to the petitioner the court held that 50 App. U. S. C. 303(a) was inapplicable because Palestine was not a neutral country. The court further stated:

"Palestine having been listed by the Selective Service Director as a neutral country, he was erroneously led to believe that he had the legal right to apply for exemption from service. That he took advantage of a privilege which the Director of Selective Service believed was expressly accorded him by law, does not stamp him as one of bad character or as one not attached to the principles of the Constitution. *United*

States v. *Siem*, 9 Cir. 299 F. 582. It is clear from the record that his original claim for exemption was prompted by his family obligations. . . ."

". . . It should be pointed out that Title 8 U. S. C. A. 724, provides that a person who has served or is serving honorably in the Armed Forces of the United States, and meets the requirements of legal residence and good moral character, may be admitted to citizenship without waiting the usual statutory residence period applicable generally. Can it be said that the petitioner's application for relief from service would have barred him from obtaining this benefit, after having renounced his exemption, had he been accepted and had he served honorably in the Armed Forces? Compare *Petition of Kohl*, 2 Cir. 146 F. 2d 347. 'Respect for law does not thrive on captious interpretations.' *Delgadillo* v. *Carmichael*, 332 U. S. 388, 68 S. Ct. 10, 12."

Petition of Ajlouny is particularly pertinent here. If the petitioner had been accepted for military service there is no question but that he would have been eligible for citizenship. The fact that he was not accepted for service—a factor entirely beyond his control—should not alter the situation. The petitioner was not permitted and did not desire to stand on his exemption throughout hostilities. According to the Director of Selective Service and World War I cases, by submitting himself to induction he no longer secured the exemption of the Selective Service Act. Therefore the disabilities incurred by his original filing of Form 301 were removed. He is therefore eligible to citizenship and eligible for suspension of deportation.

III

The Circuit Court Erred in Finding That the Citizenship Disability Is Still Operative

By virtue of Section 16 of the Selective Service Act (P. L. 473, approved June 29, 1946), Section 3(a) of the

Selective Training and Service Act of 1940 became inoperative on March 31, 1947. The Immigration Service realized that a serious question was thus raised as to whether the naturalization bar remained. It consulted the Assistant Solicitor General who ruled on August 13, 1947, that:

> "An alien who obtained an exemption from military service under this section was assumed to have rendered himself ineligible for naturalization until such time as the courts have passed upon the question." *Monthly Review, Immigration and Naturalization Service,* November, 1947, p. 56, Note 1.

Repeal of the naturalization bar after World War I operated to restore the right to apply for naturalization to those previously barred from naturalization as neutral aliens.

Interpretation 1 of the Immigration Service, June 5, 1941;
In re Carlson, 730-P 2 59687, D. C. Ill. 1942;
Petition of Otness, 49 F. Supp. 220 N. D. Calif. 1943;
Contra: In re Urmenta, 42 F. Supp. 138 (D. C. Wisc. 1941).

It is a commonplace of Anglo-American law that repeal of a statute eradicates it altogether, and the situation is as if it had never existed. 59 *Corpus Juris* 1189, 1190. Expiration of a statute is in this respect the same as repeal.

United States v. *Boisdore,* 8 How. 113;
The Irresistible, 7 Wheat. 551.

Congress in terminating the Selective Training and Service Act of 1940 was explicit and specific. It directed that the entire Act, with exceptions not here pertinent "*shall become inoperative and cease to apply*" at 12 o'clock noon on March 31, 1947, "except as to offenses committed prior to such Act." (Section 316, 50 U. S. C. App., enacted

June 29, 1946). Thus there can be no dispute but that Section 3(a) of the Act died on March 31, 1947, without exceptions or savings clause.

In addition, the termination provisions themselves are expressly preserved, including the phrase "offenses committed prior to such date" (March 31, 1947). This clearly refers only to prosecutions under Section 11.

It seems clear that Congress intended thereby to terminate *all* of the provisions of this section, including those creating the disability for United States citizenship.

It is an elementary canon of statutory construction that the grant of one express power or function is also necessarily the implicit exclusion of all others. *"Expressio unius est exclusio alterius."*

Express enumeration, therefore, of the exceptions and preserved functions contained in Section 16 of the Act, terminating all functions except enumerated, must necessarily be construed to mean that the citizenship disability created by Section 3(a) was not intended to be preserved.

At common law, the unqualified repeal or termination of a statute, without a saving clause, destroyed all rights and liabilities dependent upon it.

United States v. *Reisinger*, 128 U. S. 398;
Duke Power Co. v. *S. C. Tax Comm.* (C. A. 4, 1936), 81 F. (2d) 513, Cert. Denied 298 U. S. 669.

Statutes which have been enacted in derogation of the common law to prevent criminal prosecutions under the dying statute from being terminated, and to continue in existence criminal penalties, criminal liabilities and criminal forfeitures imposed under the erstwhile statute (*United States* v. *Reisinger, supra*), have been strictly construed [*United States* v. *Hark*, 320 U. S. 531.]

In *Ewell* v. *Daggs*, 108 U. S. 143, the Supreme Court held that after the repeal of a usury statute, a usurious rate of

interest, forfeited under the statute while in force, was reinstated, the interest was payable, and no forfeiture could be enforced. For the life of the statute, the interest rate on the contract constituted a basis for forfeiture of the entire amount of the interest. At the statute's death, the disability fell.

Congress has, however, altered the common law rule with regard to the repeal or expiration of a statute. The Act of February 25, 1871 (16 Stat. 1871) merely continued penalties, forfeitures and liabilities where an act of Congress had been repealed. In 1942, Attorney General Biddle requested legislation to permit prosecutions where a temporary statute had expired. (*House Report 261, 78th Cong.; 1st Session.*) H.R. 1201, which subsequently became Public Law 201 on March 22, 1944, (61 Stat. 633) was entitled "An Act to permit prosecutions after lapse of a temporary statute for offenses committed prior to its expiration". The Committee Reports clearly make known the purpose of this statute. In *Senate Report 734, 78th Congress, 2nd Session,* it is described as follows:

> "* * * the purpose of the bill is to provide that the expiration of a temporary statute shall not have the effect of preventing *prosecution* of an *offense* committed under the temporary statute. The bill would merely make applicable to *violations* of a temporary statute the same statutory provision "that is now in effect with respect to *offenses* against a statute subsequently repealed." (Italics supplied.)

Public Law 201 (61 Stat. 633) provides that the "expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide * * *"

Is ineligibility to citizenship, a penalty, forfeiture or liability, as the terms are utilized in Public Law 201? The

statutory history of the law indicates that Congress was concerned with continuing prosecutions where there had been some violation of law. The terms "penalty" and "forfeiture" denote the punishment imposed for a crime, default, or offense against the laws of a state. (*McCulloch* v. *Murphy*, 125 Fed. 147; *Cook* v. *United States*, 288 U. S. 102, 122; *Life Insurance Co. of Tenn.* v. *McCray*, 291 U. S. 566, 574; 37 *C. J. S.* 45; 23 *American Jurisprudence* 598, 599, 622). Petitioner, herein, neither violated nor transgressed any law of the United States when he sought draft exemption. The term "liability", likewise, connotes an obligation arising from the breach of a statutory duty. (*National Labor Relations Board* v. *National Garment Co.* 166 F. (2d) 233, 237 and footnote 4). There is here involved no breach of a duty, statutory or otherwise.

Racial ineligibility to citizenship (8 U. S. C. 703) has never been considered a "penalty, forfeiture or liability" as the terms are understood in legal parlance. Citizenship ineligibility under 50 U. S. C. App. 303-a has never been so designated judicially. Nor should it be so considered any more than racial ineligibility. Citizenship ineligibility and denial of naturalization have always been designated as the denial of a privilege. *United States* v. *Ginsberg*, 243, U. S. 472; *In re Martinez*, 73 F. Supp. 101, 105. Public Law 201 is therefore inapplicable to the instant case.

In *Benzian* v. *Godwin*, 168 F. (2d) 952 (overruled on other grounds in *Kristensen* v. *McGrath*, 340 U. S. 162) reliance was placed upon an amendment to the immigration laws (8 U. S. C. 224-c; 59 Stat. 551, October 29, 1945) to establish the proposition that Congress had continued the citizenship bar of Section 303-a of the Selective Training and Service Act beyond March 31, 1947. Prior to October 29, 1945, it had been decided administratively that aliens who claimed exemption from the 1940 Selective Service

Act and had become ineligible to citizenship, were nevertheless admissible to the United States for permanent residence. The Attorney General believed that this was an oversight of legislative draftsmanship and recommended that the immigration laws be corrected accordingly. No thought or consideration was then given to the expiration of 50 U. S. C. App. 303-a.[2] The assumption of the *Benzian* case and the Court below that a correction of the immigration definitions contained in 8 U. S. C. 224-c, extended the provisions of the Selective Service Act or evinced an intention to do so, is unwarranted. In addition it should also be noted that the *Benzian* cause was moot prior to decision in the District Court. (Memorandum of Solicitor General in the Supreme Court, No. 317, October Term, 1948, Certiorari denied, 335 U. S. 886). It is therefore not persuasive as a precedent.

The passage of Section 303-a of the Selective Service Act created a new class of aliens ineligible for naturalization—*i.e.*, those neutral aliens who claimed draft exemption. But the termination of the Selective Service Act, without a saving clause expressly preserving that ineligibility, dissolved the newly-created class of ineligibles. The Act created a bar to citizenship, but removed the bar upon its own termination.

---

[2] The legislative history of the 1945 amendment to 8 U.S.C. 224-c is reflected in the immigration file of Alvaro Valas, 56127/854.

Conclusion

For the foregoing reasons, it is submitted that the Circuit Court was in error in finding that the petitioner, a business visitor for four months, was subject to the Selective Training and Service Act of 1940 and in view of the importance of the questions presented, and the conflict with decisions of this court, it is prayed that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JACK WASSERMAN,
Warner Bldg.,
Washington 4, D. C.
Attorney for Petitioner.

APPENDIX "A"

August 2, 1951.

File: A-3087364.

In re: Antoine Bannout or Antoine Bannout Davis.

In Deportation Proceedings in behalf of Respondent: Jack Wasserman, Esq. (Heard June 8, 1951), Warner Building, Washington 4, D. C.

In behalf of Immigration and Naturalization Service: Joseph M. Wahler, Esq., Attorney, Office of the General Counsel.

Charges: Warrant: Act of 1924—Remained longer—visitor. Lodged: None.

Application: Suspension of deportation; or in the alternative voluntary departure.

This is a motion filed pursuant to 8 C.F.R. 90.11(b) wherein the Commissioner urges reconsideration and withdrawal of an order entered by this Board on April 6, 1951 granting the respondent herein the privileges of voluntary departure and preexamination and withdrawing the outstanding order and warrant of deportation. The Commissioner in the alternative urges the referral of this Board's decision to the Attorney General for review pursuant to 8 C.F.R. 90.12(c) in the event the motion is denied.

The facts of the case are fully stated in our opinion of April 6, 1951. Briefly they relate to a native and citizen of Lebanon, male, married, 36 years of age who originally arrived in this country on August 18, 1939 and was admitted for a period of 60 days as a visitor for business. He was granted several extensions of stay the last of which expired January 1, 1946. He voluntarily departed from the United States on September 22, 1945. The respondent last entered the United States on September 7, 1946 and was admitted as a temporary visitor for 6 months. Thereafter he was denied extension of temporary stay. The respondent married a citizen of the United States on October 11, 1946. A warrant was issued for his arrest in the present proceedings on June 24, 1948 and hearings were held on July 19, 1949.

The Commissioner takes issue with the conclusions

reached by this Board in our opinion of April 6, 1951 wherein we relied upon the decision of the Supreme Court in *McGrath* v. *Kristensen* (95 L. Ed. 165, 71 S.C.R. 224, December 11, 1950) to find that the respondent did not come within the category of those ineligible to citizenship as that term is used in Sections 13(c) and 28 (c) of the Immigration Act of 1924, as amended, notwithstanding the fact that on November 4, 1942 he filed an application for relief from military service (D. S. S. Form-301) under Section 3(a) of the Selective Training and Service Act of 1940, as amended. We reasoned as follows: "From the time of his entry in 1939 until his departure in 1945 respondent was in the status of a visitor for business and he left the country in accordance with the terms of his temporary admission. As the Supreme Court has read the Selective Service and Training Act of 1940, the respondent was not a 'resident' of the United States when he applied for relief from Military Service. The respondent was in the country on a valid, legal status, recognized by the Government as such. Since he was not 'residing' in the country, he was not liable for Military Service; and his application for relief from such service 'was of no effect'.

The Commissioner of Immigration and Naturalization in support of his motion urges through counsel that the Kristensen case (supra) is distinguishable from the case at Bar and that it supports the position taken by the Immigration Service. Counsel during oral argument before this Board reasoned that the Selective Training and Service Act of 1940, as amended,[3] and the Executive Order issued

---

[3] Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, ch. 720, as amended (Dec. 20, 1941) 55 Stat. 844, 845, ch. 602, 50 USCA Appx. § 303(a), FCA title 50, Appx. § 303(a), provides in part:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States . . . shall be liable for training and service in the land or naval forces of the United States: Provided, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such

pursuant thereto did not define who was a[4] 'male person residing in the United States' liable for training and service after December 20, 1941; that the definition of 'resident' as contemplated in the statute was left to administrative determination and that under the regulations issued administratively the respondent[5] was 'a male person residing in the United States' at the time he filed his application for relief from Military Service on November 4, 1942.

We concede that insofar as the Selective Training and Service regulations are concerned, counsel's argument in behalf of the Immigration Service is technically correct when applied to the facts of the case before us. However, we interpret the Kristensen case (supra) as having a much broader concept outside of the regulations in question. This broader concept in our opinion is found in the language used by Justice Reed in the Kristensen case (supra) when he said that the Selective Training and Service regulations effective February 7, 1942 (7 Fed. Reg. 855) "either made an alien in Kristensen's situation a nonresident of the United States for the purpose of the Selective Training and Service Act between February 7 and May 17, 1942 or they were nondeterminative of status in that period. In the absence of a determinative regulation the meaning of the word 'residing' in Section 3(a) requires examination. The meaning of that word, of course, depends upon the meaning of the word 'residence'. The Court after citing several references which construed the term 'residence' concluded by saying "when we consider that Section 3(a) was obviously intended to require Military Service from all who sought the advantages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders made necessary by the

---

liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States.

[4] Executive Order 8545 September 23, 1940 5 F.R. 3786 of September 25, 1940.

[5] 32 C.F.R., Cum. Sup., 611.12—611.13—611.21—611.26—611.28. For the text of these regulations see 7 F.R. 855, 2084, and 7222.

conditions of the times was residence within the meaning of the statute".

The factual situation which led to the Supreme Court's conclusion aforementioned, is material to an understanding of the issue before us. Kristensen, a Danish citizen, entered the United States as a temporary visitor for 60 days on August 17, 1939 to attend the New York World Fair. Two successive extensions of stay, each for 6 months, were applied for and granted by the Immigration and Naturalization Service but prior to his filing an application for Military relief (D.S.S. Form-301) economic necessity compelled him to become employed thereby violating his visitor's status. A warrant of deportation issued in 1941 was outstanding at the time Kristensen filed the D.S.S. Form on March 30, 1942. There was an affirmative showing that the outbreak of World War II prevented Kristensen's return to Denmark and it was for this reason that the deportation process was stayed for the duration of the hostilities.

Thus the Supreme Court was confronted with the case of an alien who had been administratively adjudicated as *unlawfully residing in the United States* by the very agency of the Government primarily charged by the Immigration Act of 1924 with the responsibility of determining whether after admission as a temporary visitor he had remained in the United States for a longer time than permitted under the said Act or regulations made thereunder. Accordingly two basic factors were presented. First Kristensen was unlawfully 'residing' in the United States under the immigration laws at the time he filed his application for relief from Military Service.—Second, under Section 3(a) of the Selective Training and Service Act of 1940 Kristensen was liable for Military Service if 'residing' in the United States within the meaning of the Act. The Selective Training and Service Act, however, did not define who was a "male person residing in the United States" liable for training and service after its amendment December 20, 1941. It was necessary for the Supreme Court to turn to the administrative regulations authorized under the Act. They found in the alternative that under applicable regulations an alien in Kristensen's situation was either a nonresident of the United States between February 7, 1942 and May 7, 1942 for

the purpose of the Selective Training and Service Act or that the applicable regulations were nondeterminative of his status during the period. The latter alternative made it necessary for the Supreme Court to interpret the term "residing" as used in Section 3(a) of the Selective Training and Service Act, as amended. It is clear from a reading of the penultimate paragraph of Justice Reed's opinion that the overall purpose of the Selective Training and Service Act together with the fact that exigencies of war made Kristensen's extended sojourn necessary were duly considered in reaching their conclusion.

The case at Bar, however, presents only the first basic factor referred to above. The respondent originally entered the United States on August 18, 1939, one day after Kristensen. Unlike Kristensen he was granted successive extensions of stay by the Immigration and Naturalization Service which extended to January 7, 1946. He voluntarily departed from the United States on September 22, 1945 while still in the lawful status of a visitor for business. At the time the respondent filed an application for relief from Military Service on November 4, 1942 the records of the agency of the Government primarily charged under the Immigration Act of 1924 with the responsibility of determining his immigration status showed that he was to be considered as a "temporary visitor" until March 1, 1943. In fact the respondent under date of August 30, 1942 wrote the then Deputy Commissioner thanking the Department of Justice "for the extension of (his) temporary stay to March 1, 1943 and for the permission to continue (his) employment". He referred to the fact that he had been placed by the "United States Farm Employment Service"—that he was "giving a hand to the farmer's harvest as I heard they were short on help when I registered" and that he "notified the local (draft) board the first day of my arrival here". Thus it is clear from the record that both the respondent and the agency of the Government primarily charged by law with the responsibility construed his status to be that of a *nonresident alien* at the time he filed the pertinent application. Under the circumstances it would be extremely arbitrary and capricious to construe the Congressional use of the term "residing" found in Section 3(a) of the Selec-

tive Training and Service Act of 1940 to include all "temporary visitors", regardless of the surrounding circumstances, or their own attitude and that of the responsible Executive Agency toward their presence here.

It is our considered opinion in light of the foregoing that we would be doing complete violence to Section 3(a) of the Selective Service statute if we construed the phrase "residing in the United States" as applicable to the respondent. Our position is amply supported by Mr. Justice Jackson's concurring opinion in the Kristensen case (supra). He repudiated a prior opinion of his (39 Op. A.G. 504) interpreting the very same clause of the Selective Training and Service Act with which we are here concerned. Justice Jackson stated that his opinion as Attorney General did not consider our diplomatic history which consistently asserted the rights of our citizens to be free from "seizure for Military duty by reason of temporary and lawful presence in foreign lands". He mentioned the fact that "if an alien is not a mere sojourner but acquires residence here in any permanent sense, he submits himself to our law and assumes the obligations of a resident toward this country". He reached the same conclusion as we do, namely, that "the language of the Selective Service Act can be interpreted consistently with this history of our international contentions". Under similar circumstances Judge Hall in Ex Parte Ghosh (58 F. Sup. 851, 854 D. C. S. D., Cal. November 16, 1944) so forcibly said, "after all, it is one government and I do not think it is within the contemplation of our system that a man should be fish before one department and fowl before another . . . it would require, I think, what John Marshall called refined and metaphysical reasoning (to subject an alien student visitor to Military Service on behalf of the United States)". These views we consider basic in adjudicating this case.

There is one point in the argument of counsel for the Immigration Service not included in those referred to above and which we think should be answered. Counsel for the Service maintains that the distinction he has raised with respect to Kristensen case (supra) was recognized by this Board in *Matter of K-*, 9623678, April 17, 1951. The alien in *Matter of K-*, (supra) last entered the United States on

January 1, 1943 and was admitted as a seaman for a period of 29 days or the length of time his vessel was in port whichever period was the shortest. He remained after his vessel departed. When he filed an application for relief from Military Service as an alien of a neutral country, Finland, on February 6, 1943 he was residing here in an unlawful status.

Thus we were confronted with the same basic factors as the Kristensen case presented, namely, an unlawfully resident alien who was liable for Military Service if "residing" in the United States within the meaning of the Selective Training and Service Act. The extent of our findings in that case parallel those of the Supreme Court in the Kristensen's case, namely, that the applicable regulation under the Selective Training and Service Act "specifically excepts a nondeclarant alien who enters the United States lawfully (K. entered lawfully as a seaman) from registering or filing an application for determination of residence (Form 302) until 3 months after the date of his entry if he entered subsequent to May 16, 1942. Since (K) lawfully entered on January 1, 1943 and was a nondeclarant alien, there was no obligation on his part under the Selective Service regulations to register or file for a determination of residence until April 1, 1943. We found on the basis of the Selective Service regulations in effect at the time of K's entry that when he filed his application for relief on February 6, 1943 he was not "residing" in the United States within the meaning of the Selective Service Act because the 3 month period of grace had not expired.

The respondent herein, however, maintained the lawful status of a temporary visitor and it was so recognized by the responsible agency of the government for the entire period of his sojourn August 18, 1939 through September 22, 1945. Accordingly counsel's argument in behalf of the Service on this point is without merit.

Order: The motion is hereby denied. Our opinion of April 6, 1951 is hereby affirmed.

——— ———,

Chairman.

In accordance with the provisions of Title 8 Code of Federal Regulations, Section 90.12(c) this case is certified to the Attorney General for review of this Board's decision.

——— ———,
Chairman.

Aug. 2, 1951.

File: A-3087364.

In re: Antoine Bannout or Antoine Bannout Davis

In Deportation Proceedings.

DISSENT

The decision by the Supreme Court in the *Kristensen* case (340 U. S. 162, 1950), in my opinion leads to the conclusion that the respondent is ineligible for citizenship. If that be so, his ineligibility disqualifies him for preexamination inasmuch as he is inadmissible to the United States (8 U. S. C. 213(c)) and cannot obtain issuance of an immigration visa (8 U. S. C. 202(f)).

The comment by Mr. Justice Jackson in his concurring opinion in the *Kristensen* case that "We should (not) construe our legislation to penalize or prejudice such aliens (here for temporary residence) for asserting a right * * *," seems not to have been transgressed. Examination of the Selective Service regulations discloses that the right of a temporary resident has been fully protected by provision promulgated February 7, 1942 for an application of determination of status (32 C. F. R. 611.21). The respondent made no such application. On the contrary, he sought exemption from liability to service by asserting his claim that he was a neutral alien. Such application under 50 U. S. C. 303 operated to bar him from becoming a citizen of the United States.

Under 32 C. F. R. 611.13, an alien who was not a member of a class specifically exempted, to which the respondent makes no claim, and who was in the United States after May 16, 1942 or for more than three months after the date of his entry, whichever is the later, is declared to be residing in the United States within the meaning of the Selective Training

and Service Act of 1940. Prima facie, therefore, he was liable to serve, and on November 4, 1942, he asserted his status as a neutral alien as basis of his application for relief from such liability. The fact that for the purpose of the immigration laws he was accorded the status of a temporary visitor is, in my opinion, beside the point.

I believe that so much of our order of April 6, 1951 which grants the respondent the privilege of preexamination should be withdrawn.

LEIGH L. NETTLETON,
Member.

LLN/jr.

September 11, 1951.

A-3087364

In re: Antoine Bannout or Antoine Bannout Davis

Before the Attorney General in Deportation Proceedings

The decision and order of the majority of the Board of Immigration Appeals dated August 2, 1951 are hereby disapproved.

(S.) PEYTON FORD,
Acting Attorney General.